EXHIBIT B

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

Docket No. 08F-259T

QWEST COMMUNICATIONS COMPANY, LLC,

Complainant

v.

MCIMETRO ACCESS TRANSMISSION SERVICES, LLC, XO COMMUNICATIONS SERVICES, INC., TIME WARNER TELECOM OF COLORADO, L.L.C., GRANITE TELECOMMUNICATIONS, INC., ESCHELON TELECOM, INC., ARIZONA DIALTONE, INC., ACN COMMUNICATIONS SERVICES, INC., BULLSEYE TELECOM, INC., COMTEL TELECOM ASSETS LP, ERNEST COMMUNICATIONS, INC., LEVEL 3 COMMUNICATIONS, LLC, AND LIBERTY BELL TELECOM, LLC

Respondents

DIRECT TESTIMONY OF

DR. AUGUST H. ANKUM

ON BEHALF OF
ESCHELON TELECOM, INC., XO COMMUNICATIONS SERVICES, INC., GRANITE TELECOMMUNICATIONS, LLC, AND ACN COMMUNICATION SERVICES, INC. ("JOINT CLEC")

PUBLIC VERSION

(A PORTION OF THIS DOCUMENT HAS BEEN FILED UNDER SEAL)

August 10, 2009

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Exhibits

I. QUALIFICATIONS AND PURPOSE OF TESTIMONY

Q. PLEASE STATE YOUR NAME, OCCUPATION AND BUSINESS ADDRESS.

A. My name is Dr. August H. Ankum. I am a Senior Vice President at QSI Consulting, Inc. My business address is 1027 Arch, Suite 304, Philadelphia, PA 19107.

Q. WHAT IS QSI CONSULTING, INC.?

A. QSI Consulting, Inc. ("QSI") is a consulting firm specializing in traditional and non-traditional utility industries, economic and econometric analysis and computer aided modeling. QSI provides consulting services for regulated utilities, competitive providers, government agencies (including public utility commissions) and industry organizations.

Q. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND AND WORK EXPERIENCE.

A. I received a Ph.D. in Economics from the University of Texas at Austin in 1992, an M.A. in Economics from the University of Texas at Austin in 1987, and a B.A. in Economics from Quincy College, Illinois, in 1982.

My professional background covers work experiences in private industry and at state regulatory agencies. As a consultant, I have worked with large companies, such as AT&T, AT&T Wireless, Bell Canada and MCI WorldCom ("MCIW"), as well as with smaller carriers, including a variety of competitive local exchange carriers ("CLECs") and wireless carriers. I have worked on many of the arbitration proceedings between new

entrants and incumbent local exchange carriers ("ILECs"). Specifically, I have been involved in arbitrations between new entrants and NYNEX, Bell Atlantic, USWEST, BellSouth, Ameritech, SBC, GTE and Puerto Rico Telephone. Prior to practicing as a telecommunications consultant, I worked for MCI Telecommunications Corporation ("MCI") as a senior economist. At MCI, I provided expert witness testimony and conducted economic analyses for internal purposes. Before I joined MCI in early 1995, I worked for Teleport Communications Group, Inc. ("TCG"), as a Manager in the Regulatory and External Affairs Division. In this capacity, I testified on behalf of TCG in proceedings concerning local exchange competition issues, such as Ameritech's Customer First proceeding in Illinois. From 1986 until early 1994, I was employed as an economist by the Public Utility Commission of Texas ("PUCT") where I worked on a variety of electric power and telecommunications issues. During my last year at the PUCT, I held the position of chief economist. Prior to joining the PUCT, I taught undergraduate courses in economics as an Assistant Instructor at the University of Texas from 1984 to 1986. A list of proceedings in which I have filed testimony is attached hereto as Exhibit AA-1.

Q. ON WHOSE BEHALF WAS THIS TESTIMONY PREPARED?

A. This testimony was prepared on behalf of Eschelon Telecom, Inc., XO Communications Services, Inc., Granite Telecommunications, LLC, and ACN Communication Services, Inc. ("Joint CLECs.")

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THIS PROCEEDING?

A. The purpose of this testimony is to address issues raised by Qwest[1] witnesses Hensley Eckert, Weisman, and Canfield. Specifically, I will rebut Qwest's claims that the Joint CLECs have harmed Qwest by charging it Commission approved just and reasonable rates. Further, I will show that Qwest's testimony is flawed for a number of reasons and that its alleged "damages" calculations are unsupported by economic theory and otherwise erroneous.

Q. DO YOU HAVE A PRELIMINARY OBSERVATION?

A. Yes. Both the FCC and the Commission rules envision that CLECs engage in off-tariff agreements,[2] so it is difficult to see how the existence of such off-tariff agreements can come as a surprise or could be discriminatory.

Further, the Commission's own rules, either under Option One or Option Two regulation, contemplate that CLECs would be allowed to engage in off-tariff agreements.[3] While under Option One, off-tariff agreements have to be filed with the Commission, under the latter, CLECs do not have to file off-tariff agreements. Thus, even *if* it is determined that the Joint CLECs failed to abide by the Commission's rules, their primary infraction would be that they did not file the agreements at issue. In other words, under the

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[1] I will generally use the name Qwest as a short hand to refer to the parent company and/or QCC. Further, it is useful for the purposes at hand to view Qwest and QCC as a one vertically integrated firm.

[2] *In the Matter of Access Charge Reform,* Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262; FCC 01-146, April 27, 2001 ("*FCC's 2001 Order*"), and Commission rules 723.2203.

[3] Commission rules 723.2203.

Commission rules there is nothing discriminatory or inappropriate about CLECs entering into off tariff agreements, it is just that they did not file them when perhaps they should have.

Next, Qwest has no basis for asserting that had it known about the agreements it could have availed itself of lower rates. To be sure, the CLECs were under *no* obligation to give Qwest rates lower than the tariffed rates. Thus, even if the Commission were to find that the CLECs did not comply with certain filing rules, such failure to file certain agreements still did not cause Qwest damages.

II. FEDERAL AND STATE REGULATIONS ENVISION AND PROVIDE FOR OFF-TARIFF AGREEMENTS BETWEEN CLECS AND IXCS – THEY ARE NOT DISCRIMINATORY – AND THERE EXISTENCE IS NO SURPRISE

a) Federal and State Regulations Envision and Provide for Off-Tariff Agreements

Q. HAS QWEST BEEN CHARGED JUST AD REASONABLE RATES?

A. Yes. Qwest has been charged rates in tariffs on file with the Commission and, as such, those rates are just and reasonable.

Q. HAS QWEST BEEN CHARGED ACCESS RATES HIGHER THAN THOSE PROVIDED FOR IN THE TARIFFS?

A. No, Qwest has not been charged access rates higher than those provided for in the tariffs. And Qwest has made no such claim.

Q. HAS QWEST OTHERWISE BEEN OVERCHARGED?

A. No, to my knowledge, Qwest has not been overcharged.[4] Again, Qwest has been charged tariffed rates that are just and reasonable.

Q. TO THE EXTENT THAT THE JOINT CLECS EXTENDED OFF-TARIFF AGREEMENTS TO OTHER CARRIERS, ARE SUCH OFF-TARIFF AGREEMENTS AT ODDS WITH FEDERAL AND STATE REGULATIONS?

A. No, both federal and state regulations envision and provide for off-tariff agreements.

i. The FCC Envisioned and Encouraged that CLECs Would Negotiate Off-Tariff Agreements with IXCs

Q. DID THE FCC ENVISION IN ITS 2001 ORDER THAT CLECS WOULD BE NEGOTIATING OFF-TARIFF AGREEMENTS WITH IXCS?

A. Yes. As noted, Qwest relies primarily on the FCC's 2001 *7th Report and Order* (CC 96-262) for its contention that CLECs control bottleneck facilities. However, the FCC in the same order made clear that CLECs were *free to negotiate access rates, terms and conditions with IXCs* and that CLEC's could both tariff access charges and offer off-tariff rates via agreements:

> In addition, by permitting CLECs to decide whether to tariff within the safe harbor or to negotiate terms for their services, we allow CLECs additional flexibility in setting their rates and the amount that they receive for their access services (¶55, see also¶¶s 3, 4,5 etc.)

[...]

[4] I am not addressing here any incidental billing disputes Qwest may have with individual CLECs.

> Additionally, we expect that our benchmark rule will have no effect on negotiated contracts, under which CLECs have chosen to charge even more favorable access rates to particular IXCs. Rather, these contracts will remain in place and the participating IXCs will continue to be entitled to any lower access rates for which they provide. (¶57)

Clearly the FCC did not believe that negotiated access rates, in combination with tariffed rates, was discriminatory or problematic for any other reason as it encouraged a *combination of both tariffs and agreements*.

ii. This Commission's Rules Provide for Off-Tariff Agreements

Q. YOU HAVE ALREADY DISCUSSED THAT THE FCC ENVISIONED THAT CLECS WOULD NEGOTIATE OFF-TARIFF AGREEMENTS WITH IXCS. DO THE COLORADO COMMISSION'S RULES LIKEWISE ENVISION SUCH OFF-TARIFF AGREEMENTS?

A. Yes. Commission's rules - 723.2203(d) explicitly anticipate that CLECs will have the latitude necessary to negotiate off-tariff agreements without the need to file those agreements with the Commission. This provision makes perfect sense given that CLECs, by definition, compete for each of the services they provide to each customer, including IXCs, and as such, they need flexibility to negotiate. Again, the FCC, like this Commission, recognized in its 2001 Order that such negotiations of off-tariff agreements would be appropriate.

Q. DO OTHER COMMISSION RULES ALSO ENVISION THAT CLECS BE NEGOTIATING OFF-TARIFF AGREEMENTS?

A. Yes. Commission rules 723.2203(c). While Commission rules 723.2203(c) require that such agreements be filed, they envision and certainly do not prohibit that CLECs negotiate agreements with access customers.

Q. IS QWEST HARMED IF CLECS ARE REMISS IN FILING OFF-TARIFFS AGREEMENTS WITH THE COMMISSION?

A. No, while it is important that carriers follow Commission rules, failure in this regard does not necessarily constitute harm to any other third party, such as Qwest. Under the Commission rule 723.2203(c), CLECs may elect Option One or Option Two:

> A CLEC *may elect to opt into one of two forms of default regulation* in their entirety. A new CLEC shall designate at the time of application for a CPCN and/or LOR under which form of default regulation it requests to be regulated or apply for an alternative form of regulation pursuant to rule 2205. An existing CLEC certified at the effective date of this rule shall notify the Commission by letter addressed to the Director of the Commission if they wish to change to the Option Two form of default regulation. If an existing carrier desires to be regulated under an alternative form of regulation, this must still be accomplished by application pursuant to rule 2205. (Emphasis added.)

Clearly, if CLECs had elected Option Two, there would have been *no requirement* to file any off-tariff agreements and *Qwest would have been in the same position it is now.*

That is, CLECs were free to enter into such agreements; they simply did not file them. Qwest has no basis for asserting that had it known about the agreements it could have availed itself of the same rates. The CLECs were under no obligation to give Qwest the same rates. Thus, even if the Commission were to find CLEC non-compliance with

certain filing rules, such failure to file certain agreements still did not cause Qwest damages.

b) The Existence of Off-Tariff Agreements Should Be no Surprise

Q. DOES QWEST COMPLAIN IT DID NOT KNOW ABOUT THE OFF-TARIFF AGREEMENTS BETWEEN CERTAIN IXCS AND THE JOINT CLECS?

A. Yes. Qwest complains that it did not know that there were off-tariff agreements between the Joint CLECs and other carriers and argues that this caused it harm.[5]

Q. IS IT RELEVANT THAT QWEST DID NOT KNOW ABOUT THE OFF-TARIFF AGREEMENTS BETWEEN CLECS AND OTHER CARRIERS?

A. No. Qwest did not need to take its cues from AT&T or Sprint; Qwest was at any moment free to negotiate off-tariff agreements for switched access services.

Q. IS IT EVEN CREDIBLE FOR QWEST TO CLAIM THAT IT DID NOT KNOW THERE COULD BE OFF-TARIFF AGREEMENTS BETWEEN CLECS AND IXCS?

A. No. As discussed earlier, the FCC in its 2001 Order had explicitly discussed such agreements. Further, as discussed, this Commission's rules explicitly provide for such agreements. Last, there has been ample other indicators, such as agreements that

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5 Weisman Direct at 12.

surfaced elsewhere in the country, to indicate that the existence of such agreements are hardly unexpected.[6]

III. QWEST'S CLAIM OF PRICE DISCRIMINATION IS PREDICATED ON A FALSE ASSUMPTION THAT THE JOINT CLECS HAVE BOTTLENECK CONTROL OVER ACCESS FACILITIES

c) Overview

Q. DOES QWEST CLAIM THAT THE JOINT CLEC PRICE DISCRIMINATED AND HARMED QWEST?

A. Yes. Qwest witnesses claim that the Joint CLECs harmed Qwest by price discriminating for switched access services.[7]

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[6] See for example a 2004 proceeding in Minnesota: *In the Matter of the Complaint of the Minnesota Department of Commerce for Commission Action Against AT&T Regarding Negotiated Contracts for Switched Access Services,* Docket Nos. P-442, 5798, 5826, 5025, 5643,443,5323,5668,466I/C-04) The Minnesota Department filed the Complaint on June 16, 2004. The public version of the Complaint discloses Eschelon's agreements with both AT&T and Sprint. The access charge case was on the Department's *July 22, 2004*, agenda (relating to consideration of a proposed protective agreement). Moreover, Joan Peterson, a Qwest attorney, is shown as receiving service of the meeting agenda: Joan Peterson's address is indicated as "Qwest Corporation." On August 24, 2005, Eric Swanson filed comments in the access charge case on behalf of "Qwest", addressing the issue of differential pricing and of-tariff agreements. Qwest filed its Colorado complaint as late as *June 24, 2008*, about four years later. Further, in December of 2005 the Minnesota Department filed a complaint against Granite (and Time Warner telecom and others) alleging that they had agreements with ATT. In its publicly-filed Answer dated February 20, 2006, Granite admitted that it had an agreement with AT&T, and that under that agreement "AT&T received lower switched access rates than Granite's tariffed rates." (*See Granite Communications, LLC's Answer to the Minnesota Department of Commerce's Verified Complaint* – Docket No. 99/C-05-1282.) Two Qwest representatives (Joan Peterson and Jason Topp) appear on the Minnesota service list. Thus, again, Qwest had at the very least knowledge that Granite (and others) had agreements with ATT two and a half years before the Colorado action was filed.

[7] See, for example, Hensley Eckert Direct at 2, 3.

Q. DO QWEST'S CLAIMS OF PRICE DISCRIMINATION AND DAMAGES HINGE CRITICALLY ON THE ASSERTION THAT THE JOINT CLECS HAVE BOTTLENECK CONTROL OVER ACCESS FACILITIES?

A. Yes. To bolster Qwest's claims of economic harm, both professor Weisman[8] and Ms. Hensley Eckert[9] assert that CLEC have bottleneck control over switched access facilities.

It is important to note that Qwest's testimony that CLEC switched access services and facilities are monopoly services and bottleneck facilities *is essential to its claim of harmful price discrimination.* In fact, without a demonstration that CLECs have bottleneck control over access facilities, no claim of harmful price discrimination can be made.[10] The following description of price discrimination makes the point:

> Price discrimination exists when sales of identical goods or services are transacted at different prices from the same provider. In a theoretical market with perfect information, no transaction costs or prohibition on secondary exchange (or re-selling) to prevent arbitrage, price discrimination can only be a feature of monopoly and oligopoly markets, where market power can be exercised.[11] (Emphasis added.)

That charging different prices to different customers is not harmful in any meaningful economic sense unless it concerns monopoly services and bottleneck facilities that limit consumer choice is obvious: if customers can avail themselves of viable alternatives, a

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8 Weisman Direct at 6.

9 Hensley Eckert Direct at 9.

10 See, for example, Charles F. Phillips, *The Regulation of Public Utilities* (Public Utilities Reports, Arlington, Virginia, 3rd Edition, 1993), page 439.

11 http://en.wikipedia.org/wiki/Price_discrimination. For a more formal and complete discussion of price discrimination, see Jean Tirole, *The Theory of Industrial Organization*, The MIT Press, Cambridge, Massachusetts, Third Edition, 1989, Chapter 3, Price Discrimination.

practice of charging different prices to different customers has no or at worst only unspecified and ambiguous welfare impacts and surely cannot be deemed, as Qwest does, harmful to competition, or, in this case, Qwest.[12] Other required aspects of harmful price discrimination, such as the intent to disadvantage certain competitors, will be discussed in a separate section below.

Professor Weisman himself acknowledges that economically harmful price discrimination requires that the service at issue concerns a monopoly service and/or a bottleneck facility:

> This potential for efficiency distortions explains why sound regulatory principles *require* that *bottleneck inputs*, switched access, for example, be priced uniformly to all similarly-situated purchasers of these inputs. That is to say, the default pricing of switched access requires that a uniform price be levied on each provider absent a factual and credible basis for departing from this uniform pricing standard.[13] (Emphasis added.)

In what follows, I will demonstrate that the Joint CLECs do not control bottleneck facilities. Next I will demonstrate that Qwest's witnesses rely on findings in a 2001 FCC Order that were not meant to be permanent and have since been overtaken by events and developments in the telecommunications industry.

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[12] Jean Tirole, *The Theory of Industrial Organization*, The MIT Press, Cambridge, Massachusetts, Third Edition, 1989, Chapter 3, Price Discrimination.

[13] Weisman Direct at 9.

d) CLECs Do Not Control Bottleneck Facilities

Q. WHAT IS A BOTTLENECK SERVICE OR FACILITY?

A. The term bottleneck facilities generally refers to a situation in which a firm has control over certain facilities at the exclusion of other firms who require such facilities in order to compete. The term may be defined as follows:

> Essential facilities, or bottleneck facilities, are network elements or services that are provided exclusively or predominantly by a monopolist or a small number of suppliers and that cannot easily be replicated or substituted by competitors for economic or technical reasons. These types of facilities are critical inputs to retail service.[14]

MCI Communications Corp. v. AT&T is a seminal case dealing with essential facilities in the telecommunications industry.[15] In this case, the Seventh Circuit discussed the elements necessary to establish liability under the "essential facilities doctrine."[16] They are:

(1) control of the essential facility by a monopolist,
(2) a competitor's inability practically or reasonably to duplicate the essential facility,
(3) the denial of the use of the facility to a competitor, and
(4) the feasibility of providing the facility.

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[14] See, for example, the definition of bottleneck facilities provided by ICT Regulation Toolkit at http://www.ictregulationtoolkit.org/en/Section.3443.html

[15] MCI v. AT&T, 708 F.2d 1081, 1132 (7th Cir.) cert. denied, 464 U.S. 891 (1983).

[16] See, for example, Federal Telecommunications Law by Peter W. Huber, Michael K. Kellogg, John Thorne, Page 327. Available on line: http://books.google.com/books?id=hkAS5wAfsc8C&pg=PA1&lpg=PA1&dq=essential+facilities+doctrine+MCI+vs+AT%26T&source=bl&ots=VlBqzF8sPY&sig=xNfdlA7RhfA6WwC0IxGm877LkgA&hl=en&ei=SqN1SsLdJc6_tgefs82WCQ&sa=X&oi=book_result&ct=result&resnum=1#v=onepage&q=essential%20facilities&f=false

While I am not addressing the legal question of whether liability can be established in this proceeding, I will be discussing that the Joint CLECs do not control bottleneck facilities, which is a necessary condition for Qwest's claims that the Joint CLECs have engaged in economically harmful price discrimination.

Q. DO THE JOINT CLECS CONTROL BOTTLENECK FACILITIES, AS ASSERTED BY THE QWEST WITNESSES?

A. No. The Joint CLECs in Colorado use access facilities that are generally available to most carriers, including Qwest. In fact, many of the Joint CLECs' facilities used in the provision of access services are facilities the Joint CLECs do not even own themselves but rather *have leased from Qwest*. That is, many of the facilities over which the Joint CLECs allegedly have bottleneck control are in fact *owned and operated by Qwest, the parent company of QCC*. Of course, because the facilities are owned and operated by Qwest, QCC, and other qualified carriers, have access to these very same facilities.

Q. DOES QWEST HAVE A NEAR UBIQUITOUS NETWORK IN ITS SERVING AREA, CAPABLE OF REACHING ALL END USER CUSTOMERS, ITS OWN AND THE CLECS'?

A. Yes. Due to its legacy position as a RBOC and as part of its ongoing operations, Qwest owns and operates in its own serving area a near ubiquitous network with facilities that allow it to serve virtually all end users. Even with respect to CLEC customers, served by CLECs with loops leased from Qwest, Qwest tends to have duplicative facilities. It is

hard to see how one can credibly claim that the Joint CLECs – who lease much of their facilities from Qwest – control bottleneck facilities.

Q. ARE CLECS ALLOWED TO LEASE ACCESS FACILITIES, SUCH AS LOOPS AND TRANSPORT, FROM QWEST ON A LONG TERM AND EXCLUSIVE BASIS SO AS TO ESTABLISH BOTTLENECK CONTROL?

A. No. CLECs lease unbundled network elements ("UNE") such as loops on a month-by-month basis conditional on who serves the end user customer.[17] CLECs simply do not have bottleneck control over such facilities. Further, Qwest often operates duplicative facilities (this is certainly true for most transport links) that would allow Qwest or others an alternative path to end users.

Q. ARE CLEC FACILITIES IN FACT OFTEN USED FOR HIGH VOLUME BUSINESS CUSTOMERS THAT MAKE USE OF THESE FACILITIES BY OTHER CARRIERS OR THE SUPPLY OF ALTERNATIVE FACILITIES ECONOMICALLY VIABLE?

A. Yes. Often the CLEC customers are business customers in urban areas and thus more likely to have traffic volumes that are sufficiently high to justify competition for those customers (and thus the facilities will be available to and come to be used by a successful competitor) or the use of alternative paths. In any event, CLECs do not have bottleneck control to prevent use of the facilities by competitors.

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[17] Some carriers obtain such network elements through commercial agreements.

Q. IN VIEW OF THE ABOVE, ARE THE FOUR ELEMENTS OF THE ESSENTIAL FACILITIES DOCTRINE SATISFIED?

A. No. Again, the four elements of the essential facilities doctrine are:

(1) control of the essential facility by a monopolist,
(2) a competitor's inability practically or reasonably to duplicate the essential facility,
(3) the denial of the use of the facility to a competitor, and
(4) the feasibility of providing the facility.

Clearly, the Joint CLECs are not monopolists, the Joint CLECs' competitors have access to the same facilities as the Joint CLECs and often Qwest has duplicate facilities in place, the Joint CLECs are in no way denying any carriers access, and it is feasible for other carriers to provide the facilities. In sum, the Joint CLECs do not have bottleneck control over essential facilities.

e) Qwest's Claim that the Joint CLECs Control Bottleneck Facilities Is Based on a 2001 FCC Finding that Was Explicitly Transitional and Is Now Outdated and Overtaken by Other FCC Orders

Q. WHAT IS THE BASIS FOR QWEST'S CLAIM THAT THE JOINT CLECS CONTROL BOTTLENECK FACILITIES?

A. Qwest's witnesses bypass a more in-depth analysis of whether the Joint CLECs control bottleneck; instead, they refer to an old FCC order.[18] Specifically, Qwest's witnesses refer to the FCC's 2001 Order.

[18] Weisman Direct at 6. Hensley Eckert Direct at 9.

Q. DO THE FINDINGS IN THE FCC'S 2001 ORDER STILL SUPPORT THE CLAIM THAT THE JOINT CLECS CONTROL BOTTLENECK FACILITIES?

A. No. The findings in the FCC's 2001 Order were explicitly transitional and have since been overtaken by events in the telecommunications industry.

Q. PLEASE ELABORATE ON YOUR OBSERVATION THAT THE FCC'S BENCHMARKING POLICY WAS EXPLICITLY INTENDED TO BE *TRANSITIONAL*.

A. The FCC explicitly noted that its findings were *transitional*: the FCC said:

> We stress, however, that the [benchmark] mechanism set out below is a *transitional* one; it is not designed as a permanent solution to the issues surrounding CLEC access charges.[19]

Though the FCC is currently engaged in efforts to comprehensively address inter-carrier compensation issues, the FCC has yet to take action more than seven years later. As explained below, market developments that have taken place since the FCC 2001 Order, rendering its transitional findings obsolete.

Q. YOU STATED ABOVE THAT CHANGES IN THE TELECOMMUNICATIONS INDUSTRY HAVE OVERTAKEN THE FCC'S RATIONALE IN ITS 2001 ORDER. PLEASE EXPLAIN.

A. In its 1997 *Access Reform Order*, the FCC specifically recognized the presumptively competitive nature of CLEC exchange access services:

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[19] *FCC's 2001 Order*, ¶ 7. (Emphasis added.)

> [A]s CLECs attempted to expand their market presence, the rates of incumbent LECs or other potential competitors should constrain the CLECs' terminating access rates. The Commission found that access customers likely would take competitive steps to avoid paying unreasonable terminating access charges. Thus, it explained that a call recipient might switch to another local carrier in response to incentives offered by an IXC.[20]

When the FCC revisited the issue in its 2001 Order, it came to an *opposite* conclusion. The FCC noted:

> We decline to conclude, in this order, that CLEC access rates, across the board, are unreasonable. Nevertheless, there is ample evidence that the combination of the market's failure to constrain CLEC access rates, our geographic rate averaging rules for IXCs, the absence of effective limits on CLEC rates and the tariff system create an arbitrage opportunity for CLECs to charge unreasonable access rates. Thus, we conclude that some action is necessary to prevent CLECs from exploiting the market power in the rates that they tariff for switched access services.[21]

However, while the FCC concluded in 2001 that CLECs may have been able to exploit some degree of market power, it is important to note that the FCC identified *two developments* that would make exchange access markets competitive:

> The Commission previously projected that, at least in the case of originating access service, IXCs would likely enter marketing alliances with LECs offering low-priced access service and would thereby be able to exert downward pressure on CLEC access rates. The Commission even raised the prospect that IXCs would themselves choose to enter the local

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[20] *FCC's 2001 Order*, ¶ 14, referencing *In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges;* First Report and Order, CC Docket No. 96-262; CC Docket No. 94-1; CC Docket No. 91-213; CC Docket No. 95-72; FCC 97-158, 12 FCC Rcd 15982; 1997 FCC LEXIS 2591, May 16, 1997 ("1997 Access Charge Reform Order").

[21] *FCC's 2001 Order,* ¶ 34.

service market as a means of exerting downward pressure on terminating rates.[22]

That is, CLEC exchange access services would be subject to competitive alternatives if the following occurred:

1. Alliances between IXCs and ILECs.
2. IXC entry into local exchange markets.

In 2001, the FCC lamented that neither of these developments had yet come to pass and, accordingly, the FCC concluded that CLECs must have some degree of market power in the provision of exchange access services:

> *However, neither of these eventualities has come to pass, at least not to an extent that has resulted in effective downward competitive pressure on CLEC access rates.* We now acknowledge that the market for access services does not appear to be *structured* in a manner that allows competition to discipline rates.[23]

Of course, what the FCC was hoping for in 2001 – alliances between IXCs and ILECs and IXC entry into local markets – now *has* come to pass.

Q. HOW HAVE THESE PRECONDITIONS FOR A FUNCTIONING ACCESS MARKET SINCE COME TO PASS?

A. All Regional Bell Operating Companies – *including Qwest* – have obtained Section 271 approval to provide interLATA long distance services, and perhaps more importantly,

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22 *FCC's 2001 Order*, ¶32.

23 *FCC's 2001 Order*, ¶32. (Emphasis added.)

there have been a number of mergers between IXCs and ILECs – most notably the *megamergers* between AT&T and SBC and Verizon and MCI – which have further transformed the traditional ILECs into vertically integrated firms that offer local and long distance services. The watershed changes brought about by the megamergers and Section 271 approvals impact and alter any conclusions regarding the CLECs' ability – or lack of ability – to exercise market power due to any alleged barriers to entry faced by IXCs. Indeed, given that the RBOCs, such as Qwest, own and operate most of the country's local loop facilities (i.e., the links that connect to end user customers and over which switched access service is provided), it must now be concluded that their IXC affiliates no longer face any *barriers to entry*.

Q. ARE YOU SAYING THAT CLECS DO NOT HAVE MONOPOLY CONTROL OVER ACCESS FACILITIES?

A. Yes. The above developments, among other the mergers between IXCs and LECs, have provided the IXCs with competitive alternatives to the CLECs' facilities (which were often leased in the first place.)

Q. PLEASE EXPLAIN FURTHER?

A. As indicated in the FCC's *Access Charge Reform Order*, the FCC envisioned a situation in which CLEC access rates would be constrained by an IXC providing incentives to call recipients (i.e., end user customers) to switch to another local carrier so that the IXC could avoid any excessive access rates of CLECs. Now that RBOCs like Qwest are large

vertically-integrated firms, their IXC companies, such as QCC, have the ability to do just that: provide incentives to call recipients (i.e., end user customers) to switch to another local carrier (most likely their affiliated local company) so that the IXC can avoid paying CLEC access rates that they deem excessive.

In short, the rationale that the FCC relied upon in 2001 for its "about face" – reversing a prior conclusion that CLEC access rates are subject to competition –is simply no longer valid.

Q. WHAT IS THE IMPORTANCE OF THE OBSERVATION THAT THE FCC'S CONDITIONS FOR FUNCTIONING ACCESS MARKETS HAVE COME TO PASS?

A. The market developments that have taken place since 2001 have transformed the environment and eliminated the barriers to entry faced by IXCs that led the FCC to implement its benchmark policy. Given that the large integrated firms can easily avoid access charges through the joint marketing of services with their affiliate LECs, the presumption expressly contemplated by the FCC -- that the new market environment created by these mergers will prevent CLECs from being able to exercise the necessary market power to sustain unreasonable access rates at the expense of IXCs -- has occurred. IXCs now have options.

As explained above, through their local exchange company affiliates, IXCs have alternatives and one cannot say that CLECs control bottleneck facilities.

Q. ARE THERE SUBSEQUENT FCC ORDERS IN WHICH THE FCC IN FACT FINDS THAT CERTAIN ACCESS FACILITIES ARE *NO LONGER* BOTTLENECK FACILITIES?

A. Yes. The FCC in its *Triennial Review Order*[24] and again in its *Triennial Review Remand Order*[25] determined that local communications markets do not exhibit impairment as it relates to switching-related facilities and services – which are the very facilities and services that support exchange access. For example, in the *TRRO* the FCC found:

> We conclude, based on the record here, and the reasonable inferences we draw from it, that competitive LECs not only have deployed a significant, growing number of their own switches, often using new, more efficient technologies such as packet switches, but also that they are able to use those switches to serve the mass market in many areas, and that similar deployment is possible in other geographic markets. Additionally, we find that the BOCs have made significant improvements in their hot cut processes that should better situate them to perform larger volumes of hot cuts ("batch hot cuts") to the extent necessary. We find that these factors substantially mitigate the *Triennial Review Order*'s stated concerns about circuit switching impairment.[26]

The conclusions reached by the FCC in its *TRO* and *TRRO* (which removed the unbundling requirements for ILEC switching) signify that *switching-related facilities and*

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[24] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 01-338/96-98/98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, Rel. August 21, 2003 ("*Triennial Review Order*" or "*TRO*").

[25] *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-290, rel. February 4, 2005 ("*Triennial Review Remand Order*" or "*TRRO*").

[26] *TRRO,* ¶ 199.

services are not a source *of significant market power.*[27] Switching is of course only one component of switched access services; still the FCC's finding that switching is not a bottleneck facility undermines Qwest's claim that CLECs have bottleneck control. Further, as discussed previously, CLECs for the most part do not own their own loops but tend to lease them as unbundled network elements, often from Qwest, on a conditional basis,[28] so one cannot reasonably argue that CLECs have bottleneck control over loop facilities.

The bottom line is that the current telecommunications marketplace is structured in such a way that a CLEC do not have control over bottleneck facilities.

Q. DOES THE OBSERVATION THAT AN IXC HAS NO ALTERNATIVES AT THE MOMENT A CALL NEEDS TO ORIGINATE FROM OR TERMINATE TO A CLEC CUSTOMER MEAN THAT CLECS HAVE BOTTLENECK CONTROL?

A. No. This is an erroneous and extreme short run analysis in which the IXC is portrayed as having no alternatives *at the very moment* of call origination or delivery. Such a short run analysis is meaningless. In the extreme short run, consumers lack alternatives to most products they consume. For example, while in flight, I have no alternatives to an

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[27] My reference to the TRRO is no indication that I agree with the FCC's findings in the *TRRO* from an economic perspective. I only use it to illustrate the fact that the benchmark imposed by the FCC on CLEC interstate access rates in 2001 is inconsistent with the FCC's findings that carriers can reasonably provide services over self-provided switching (a fundamental component of switched access services) such that competing carriers are not impaired in the absence of unbundled access to the switching network element pursuant to Section 251 of the Act.

[28] Loops are leased conditional on being able to serve an end user, and cannot be leased to exclude another carrier from using the loop to serve a specific customer.

airline's beverage and food services, bathroom services, headsets, etc. So what? An attempt to exploit a falsely perceived sense of bottleneck control by means of, say extortionist pricing, would quickly be penalized in the longer run. Once I hit ground, I would never use the airline again.

The point is that any meaningful analysis of market structure, market power and control over bottleneck facilities needs to consider the long run and not the extreme short run. For example, under established antitrust analysis, prices above competitive levels signify market power only when they are sustainable over a *significant time period*, for the foreseeable future. See for example the United States Department of Justice's *Horizontal Merger Guidelines*, which is an authoritative source for market power discussions. Per the *Horizontal Merger Guidelines*, the DOJ typically considers longer time periods, such as a period of two years, to let market forces, including all existing and potential supplies and demand responses, play themselves out. Again, an analysis that basis a conclusion on the lack of alternatives at the *very moment* of call origination or call termination is utterly meaningless, since it, by construction, precludes the very market responses that would be capable of defeating an attempt at exercising market power/bottleneck control over facilities.

f) The Joint CLECS' Have No Incentive To Disadvantage Qwest Nor Have They Sought Gains at the Expense of Qwest

Q. DID THE JOINT CLECS INTEND TO ADVANTAGE THEMSELVES AT THE EXPENSE OF QWEST?

A. No. Typically, one thinks of price discrimination as a situation in which a firm charges a certain set of customers or one customer higher prices in order to either increase its profits or to otherwise advance its competitive position *vis-a-vis* those customers in downstream markets. None of those considerations are relevant in the current proceeding. The Joint CLECs charged Qwest tariffed rates that are Commission approved. Further, to the extent that the Joint CLECs engaged in off-tariff agreements that might contain lower rates, those lower rates neither increase the Joint CLECs' rates nor do they in advance the Joint CLECs' competitive position relative to Qwest in downstream markets.

Q. IS CHARGING DIFFERENT PRICES TO DIFFERENT CUSTOMERS FOR GOOD FAITH REASONS SOCIALLY UNDESIRABLE OR OTHERWISE OBJECTIONABLE?

A. No. Virtually all companies vary prices for a large number of reasons, such as volume discounts, off-peak pricing and cost considerations, sales and promotions to certain qualifying customers, etc. There are indeed few instances in which price variations across customers constitute harmful price discrimination and most of the time it concerns socially desirable pricing practices that advance economic welfare. Consider for example the following discussion on this issue:

> Price discrimination is the practice of charging different persons different prices for the same goods or services. Price discrimination is made illegal under the Sherman Antitrust Act. 15 U.S.C. §2, the Clayton Act, 15 U.S.C. §13, and by the Robinson-Patman Act, 15 U.S.C. §§13-13b, 21a, when engaged in for the purpose of lessening competition, such as tying the lower prices to the purchase of other goods or services.[29]

> If different prices are charged to different customers for a good faith reason, such as an effort by the seller to meet the competitor's price or a change in market conditions, it is not illegal price discrimination. Merely charging different prices to different customers is not illegal, when there is no intent to harm competitors.[30]

Q. DO THE JOINT CLECS HAVE REASONS TO FAVOR OTHER IXCS, SUCH AS AT&T, OVER QWEST IN ORDER TO ADVANCE THEIR OWN COMPETITIVE POSITION OR PROFITS?

A. No. The Joint CLECs have no reason for ulterior motives in this regard. But for the economic reasons discussed in this testimony, the Joint CLECs have no incentive to prefer, say, AT&T to Qwest in the sale of access services. Importantly, the Joint CLECs surely had no interest to favor AT&T over Qwest in order to advance their own competitive position or profits.

In fact, as a result of the agreements, the Joint CLECs received rates lower than tariff rates from AT&T (and other IXCs in some instances), which caused the Joint CLECs to suffer harm and receive less access revenues. Again, the Joint CLECs did not enter into

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29 See, for example, US Legal definitions at: http://definitions.uslegal.com/p/price-discrimination/

30 US Legal definitions at: http://definitions.uslegal.com/p/price-discrimination/

these agreements because they wanted to but because they were forced into it under pressure from large buyers of their services.[31]

g) Qwest Claims of Price Discrimination Are Unsupported by Cost Information: Qwest Is Not Similarly Situated as AT&T or Sprint

Q. IS IT WELL RECOGNIZED THAT THE CLAIM OF PRICE DISCRIMINATION HINGES CRITICALLY ON WHETHER THERE ARE VARIATIONS IN THE COSTS BETWEEN CUSTOMERS?

A. Yes. Price variations are entirely justified if there are variations in costs across customers. In fact, if there are cost variations across customers and a carrier is forced to offer its services at a uniform price, *the uniform price is itself a form of price discrimination.*[32]

Q. HAS QWEST PRESENTED DETAILED COST INFORMATION SO THAT THE COMMISSION CAN EVALUATE QWEST'S CLAIM THAT THE JOINT CLECS ARE PRICE DISCRIMINATING?

A. No. While professor Weisman acknowledges the importance of cost information in asserting that the Joint CLECs' off-tariff agreements are price discriminating,[33] he and the other Qwest witnesses fail to present *any cost information.*

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[31] Further, it made sense for certain CLECs to engage in off-tariff agreements with AT&T in order to avoid protracted and costly collection and possibly ligations efforts.

[32] See, for example, Charles F. Phillips, *The Regulation of Public Utilities* (Public Utilities Reports, Arlington, Virginia, 3rd Edition, 1993), page 69.

[33] Weisman Direct at 5.

Q. IS QWEST SIMILARLY SITUATED AS AT&T?

A. No. AT&T is much larger than Qwest in terms of total CLEC-wide access charge volume (specific to each carrier's agreement, i.e., nationwide, region wide, etc.). While Qwest argues this volume provides no "cost basis" for reasonable discrimination – this consideration is not Qwest's to make. Further, the notion that customers with larger volumes qualify for different terms and conditions is hardly controversial and consistent with what is observed elsewhere in the industry and practiced by Qwest itself.

Q. DO YOU HAVE SOME DATA THAT DEMONSTRATE THAT QWEST IS NOT SIMILARLY SITUATED AS AT&T AND SPRINT?

A. Yes. AT&T and Sprint, though to a lesser degree, are much larger than Qwest in terms of total CLEC-wide access charge volume (specific to each carrier's agreement, i.e., nationwide, region wide, etc.), especially if the time frame of when the Joint CLECs entered into agreements with AT&T is considered (2000-2004).[34] The following table illustrates this point:

[34] Mr. Brotherson's direct testimony lists the dates of the CLEC agreements with AT&T as follows: 2000 for Eschelon (p. 20), 2001 for XO (p. 7), 2003 for Granite (p. 17) and 2004 for ACN (p. 25). Using these dates in no way indicates that the Joint CLECs concede that they have any liability for activities during this time frame or at any date prior to the applicable statute of limitations period.

Table. Total Toll Service Revenues by Provider (in Millions)

Company	2000	2001	2002	2003	2004
AT&T Companies	$ 38,110	$ 33,942	$ 27,531	$ 22,814	$ 23,619
Qwest Companies	$ 3,418	$ 3,444	$ 3,377	$ 2,948	$ 4,090
Sprint Long Distance	$ 9,038	$ 8,424	$ 7,077	$ 6,326	$ 5,900
Ratio: AT&T to Qwest	11.1	9.9	8.2	7.7	5.8
Ratio: Sprint to Qwest	2.6	2.4	2.1	2.1	1.4

Revenue Source: FCC, Statistics of Comunications Common Carriers (2004/2005 edition), Table 1.4

As seen in the above table, in terms of toll revenue,[35] AT&T, for example, was *6 to 11 times larger than Qwest*. These numbers are dramatic and invalidate Qwest's testimony alleging that rate differentials cannot be explained by differences in traffic volumes.

For residential markets – important for ACN – the FCC also reports the IXC market shares in terms of toll minutes. Based on that data, in 2002-2003 – the years immediately preceding ACN's agreement with AT&T,[36] AT&T's residential market share exceeded 30%, Sprint's market share was over 7%, while Qwest's market share was approximately 3%.[37]

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[35] While the data on access or toll minutes are not publicly available, toll revenues is a reasonable proxy for the difference between Qwest's and AT&T access volumes, including access volumes with CLECs. Note that the FCC stopped reporting toll revenue data by carrier starting in 2005.

[36] Because a CLEC agreement with an IXC is typically preceded by a period of IXC's non-payment and negotiations between the CLEC and IXC, the situation in the market in years immediately preceding the year of the agreement is the most relevant to the CLEC's decision to agree to reduced rates.

[37] See the FCC *Trends in Telephone Service*, February 2007, Table 9.5.

Q. PLEASE FURTHER EXPLAIN WHY TRAFFIC VOLUMES HAVE A BEARING ON COSTS AND OFF-TARIFF RATE AGREEMENTS.

A. Tariffed rates are by definition "averaged" rates, recovering "on average" costs that vary across various circumstances. To better match rates with costs, the FCC and ostensibly the Commission rules, permit CLECs to engage in off-tariff agreements with rates that deviate from average rates. Access costs certainly do vary by volume, contrary to Qwest's assertions.

Q. GIVEN THAT QWEST IS NOT SIMILARLY SITUATED AS AT&T OR SPRINT, IS QWEST'S CLAIM THAT THE JOINT CLECS PRICING PRACTICES HAVE DONE IT HARM JUSTIFIED?

A. No. Because any rate differentials are justified by, among other reasons, volume and commensurate cost differentials, any disadvantages Qwest may have experienced in its competitive position vis-à-vis other carriers, such as AT&T, may simply be an appropriate reflection of underlying volume and cost differentials and, as such, they do not constitute damages.

Further, as discussed, given that Qwest is a price taker in retail markets, access rate differentials are unlikely to have impacted Qwest's competitive position at all.[38] In any event, Qwest surely has made no demonstration how its competitive position was impacted.

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[38] Again, under economic theory, Qwest simply meets the market price in order to be competitive with AT&T and others, irrespective of whether AT&T is allowed to pay the Joint CLECs' tariffed switched access rates or something lower.

Q. IS IT LOGICAL FOR CLECS TO EXTEND OFF-TARIFF AGREEMENTS TO AT&T?

A. Yes. As the nation's largest telecommunications firm, AT&T, as a monopsonist, has market power over its much smaller suppliers.[39] For example, CLECs are in no position to refuse service to AT&T while marketing its services to end users with the caveat sales pitch: ".....oh, but by the way, if you use our service you won't be able to receive any calls from AT&T long distance customers – the largest long distance carrier in the nation." In part, AT&T's market power is enhanced because of its dominance in the national marketplace (whereas Qwest's strength is more regionalized). The nationwide scope of any agreements with AT&T highlights the differences between AT&T, Sprint and Qwest.[40]

Q. HAS QWEST ACTIVELY SOUGHT TO ESTABLISH OFF-TARIFF AGREEMENTS WITH THE JOINT CLECS?

A. To my knowledge, prior to 2008, Qwest did not actively seek to establish off-tariff agreements with the Joint CLECs in Colorado in the manner that AT&T and others did. This further situates them differently than, say, AT&T, who worked actively (and aggressively) in this regard. For example, if Qwest has an agreement with Hertz Rent-a-Car, and Alamo continues to pay the tariffed rate, is Qwest discriminating against Alamo

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[39] Provide definition of the term monopsonist, plus references.

[40] Further, it made sense for certain CLECs to engage in off-tariff agreements with AT&T in order to avoid protracted and costly collection and possibly ligations efforts.

because it did not actively seek Alamo out to tell them about the better deal it had given Hertz? The answer is certainly no.

Q. SHOULD CLECS BE REQUIRED TO PERFORM DETAILED COST STUDIES TO JUSTIFY THEIR PRICING PRACTICES?

A. No. CLECs are presumptively competitive carriers subject to a different form of regulation than ILECs and not required to conduct cost studies to support their rates. As such, CLECs generally have not submitted cost studies for their services.

As discussed, Qwest's claim of price discrimination requires a demonstration that the Joint CLECs' costs do in fact not vary with the different volumes of access traffic generated by AT&T, Sprint and Qwest. However, given that Qwest initiated this complaint proceeding, it should not be allowed to reverse the burden of proof and force the Joint CLECs to make cost demonstrations.[41] Moreover, everybody that works in this industry and has examined cost information will be aware that traffic volumes are a major cost driver: as such, the conclusion that costs vary with traffic volumes should be the rebuttable presumption – and Qwest failed to rebut it.[42]

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[41] Qwest employs economist and cost analyst that are experienced in the review and preparation of cost studies for both Qwest and other companies.

[42] For a discussion of how economies of scale impact costs, see, for example, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, Rel. November 5, 1999, ¶ 258 ("*UNE Remand Order*"). While this discussion focuses on switching, it is also pertinent to the costs of other network components, such as transport.

IV. QWEST HAS FAILED TO SHOW THAT IT HAS BEEN HARMED BY JOINT CLEC PRACTICES

Q. WHAT IS THE *CONCEPTUAL NATURE* OF THE DAMAGES QWEST CLAIMS?

A. The fact that other carriers were charged lower rates than Qwest in and of itself does not constitute harm or damages. Thus, in order to make a case for damages, Qwest witness professor Weisman claims that Qwest has been harmed in its *competitive position* as an IXC relative to its competitor IXCs.[43] Of course, saying that Qwest has been harmed in its competitive position in no way quantifies how much the damages are.

Q. HOW DOES QWEST *CALCULATE* WHAT ITS DAMAGES ARE?

A. Qwest calculates its damages as the differential between the access rates it has been charged and those that others have been charged. As Qwest's witness Ms. Hensley Eckert puts it:

> Retrospectively, QCC believes it is entitled to reparations (i.e., refunds) of amounts it overpaid the respondent CLECs relative to the discounted amounts it would have paid had the CLECs extended the same discount to QCC as they did to AT&T and Sprint.[44]

The actual calculations are performed and supported by Qwest witness Mr. Canfield.

Q. ASIDE FROM THE QUESTION WHETHER THE JOINT CLECS ARE PERMITTED TO OFFER LOWER, OFF-TARIFF RATES TO OTHER

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43 Weisman Direct at 4, and Section IV.

44 Hensley Eckert Direct at 19, 20.

CARRIERS, IS QWEST'S *METHOD* OF CALCULATING DAMAGES CORRECT?

A. No. First, Qwest has not been, as alleged by Qwest, overcharged or harmed. Be that as it may, the differential between what Qwest paid and what other carriers may have paid in no way constitutes an economic "damage" that meaningfully corresponds to the alleged *impairment* of its competitive position.

Q. HAS QWEST DEMONSTRATED THAT THE RATE DIFFERENTIAL IS CONCEPTUALLY AND QUANTITATIVELY EQUAL TO THE ALLEGED IMPAIRMENT IN ITS COMPETITIVE POSITION?

A. No. Professor Weisman, who testifies to economic issues and discusses that Qwest has been impaired in its competitive position, does not discuss how Qwest's damages should be calculated nor does he give guidance on this issue to the other Qwest witnesses. Indeed, there is a complete disconnect between the economic testimony provided by professor Weisman and Mr. Canfield's "damages" calculations. To be sure, professor Weisman's testimony does not provide any economic or conceptual support for Mr. Canfield's approach to and quantitative outcomes of his "damages" calculations. In any event, it seems as if Mr. Canfield's testimony floats in a legal and economic vacuum, unconnected to the testimony of professor Weisman.

Q. WHY IS THIS PROBLEMATIC?

A. It is problematic for a number of reasons. First, even if the Commission were to agree with professor Weisman (and the Commission shouldn't), it in no way follows that

damages should be calculated as Mr. Canfield does. Again, there is a total disconnect between professor Weisman's testimony and Mr. Canfield's alleged "damages" calculations.

Next, Mr. Canfield is not an economist and does not otherwise attempt to demonstrate that he is qualified to testify to how economic damages should be calculated, which, as noted, is a highly complex legal and economic issue. The same is true for Ms. Hensley Eckert. This means that irrespective of whether this Commission has the authority to order the Joint CLECs to pay for damages, the Commission simply doesn't have a record to adequately quantify such damages.

Q. HAS QWEST IN ANOTHER SETTING ARGUED AGAINST THE APPLICATION OF THE TYPE OF "DAMAGES" CALCULATED BY MR. CANFIELD?

A. Yes. Qwest argued before the Minnesota Department of Commerce ("DOC") that the only legally permissible remedy was a monetary penalty payable to the Minnesota DOC and that damages, such as the ones calculated by Mr. Canfield in the current proceeding, were not available to other telephone companies, such as Qwest in the current proceeding, who were not parties to the unfiled agreements. *See* Ex. W, Qwest Corp. Proposed Procedure for Penalty Phase, Exceptions to ALJ Findings of Fact, Conclusions of Law, and Recommendation (Sept. 30, 2002) at 115-116, *Qwest Unfiled Agreement Action.*

Qwest appealed the Minnesota DOC's order to a federal district court in Minnesota. That court upheld the penalty against Qwest but reversed the award to non-contracting CLECs on statutory authority grounds. Qwest appealed to the Eighth Circuit, which affirmed both of the district court's rulings.[45] Thus, both courts agreed with Qwest that the only permissible remedy for a carrier's unfiled agreements was the monetary penalty ordered by the commission against that carrier—not damages to any non-party telephone company.[46] Yet, in the current proceeding Qwest is seeking damages at odds with Qwest's successful opposition to such damages.

Q. HAS QWEST ATTEMPTED TO QUANTIFY BY OTHER MEANS IMPAIRMENT IN ITS COMPETITIVE POSITION?

A. No. Qwest has provided no meaningful quantification of how its competitive position has been impaired. In fact, other than general discussions about price discrimination and some hypothetical discussions about least cost providers, *there is no testimony showing that Qwest's competitive position has been impaired at all.*

Q. IS IT LIKELY THAT ACCESS RATE DIFFERENTIALS HAVE NOT IMPAIRED QWEST'S COMPETITIVE POSITION?

A. Yes. Qwest, AT&T and others compete as large vertically integrated firms for many services for millions of customers across many states. It is not plausible that the

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45 *See Qwest Corp. v. Minnesota Pub. Utils. Comm'n*, 427 F.3d 1061, 1063 & n. 1 (8th Cir. 2005).

46 *Id.* at 1063, 1065-66.

relatively small amounts calculated by Mr. Canfield ***xxxxxxxxxx*** would have a meaningful – if any at all – impact on Qwest's ability to price its services competitively.

Q. WHY DO YOU SAY THAT QWEST'S ABILITY TO PRICE ITS SERVICES COMPETITIVELY IS LIKELY NOT IMPACTED BY THE JOINT CLECS' PRICING PRACTICES?

A. Telecommunications end user markets are generally competitive and companies, even large ones such as AT&T, Verizon and Qwest are *price takers*. This means that Qwest sets its end user prices relative to what the market can bear – *not relative to what CLECs charge AT&T or Qwest for access*. Put differently, under economic theory, we must assume that Qwest simply meets the market price in order to be competitive with AT&T and others, irrespective of whether AT&T is allowed to pay the Joint CLECs' tariffed switched access rates or something lower. Thus, a slight and relative to Qwest's and AT&T's overall costs nearly imperceptible differential in access charges is likely to have no impact on Qwest's end user pricing and its competitive position relative to AT&T and others. (In a separate section below I will discuss that AT&T and Qwest have a settlement agreement that covers various off-tariff agreements the companies have engaged in across the country, and so the relationship between the two companies and how access rates impact their relative competitive positions is very different than portrayed by professor Weisman and Mr. Canfield.)

Q. IN SUM, HAS QWEST SHOWN THAT IT HAS BEEN HARMED BY THE JOINT CLEC'S PRACTICES?

A. No. Further, as noted before, even if it is determined that the Joint CLECs failed to abide by the Commission's rules, their primary infraction would be that they did not file the agreements at issue. CLECs were free to enter into such agreements, they simply did not file them. In view of this, Qwest has no basis for asserting that had it known about the agreements it could have availed itself of lower rates. Clearly, the CLECs were under no obligation to give Qwest the rates lower than the tariffed rates. (Moreover, as discussed above, prior 2008, Qwest never actively sought off-tariff agreements in the manner that AT&T and others did.) Thus, even if the Commission were to find CLEC non-compliance with certain filing rules, such failure to file certain agreements still did not cause Qwest damages, nor has Qwest shown that it incurred any.

V. QWEST'S AGREEMENT AND SETTLEMENT WITH AT&T FURTHER UNDERMINES QWEST'S UNSUPPORTED CLAIMS THAT IT HAS BEEN HARMED

Q. HAS QWEST ENTERED INTO A SETTLEMENT AGREEMENT WITH AT&T THAT COVERS A LARGE NUMBER OF BILLING DISPUTES AND OFF-TARIFF ACCESS AGREEMENTS?

A. Yes. Qwest and AT&T have a settlement agreement ("Settlement Agreement and Release") that covers a large number of billing disputes and off-tariff agreements across many states, including Colorado, and resolves various countervailing claims the companies have on one another. The agreement states as follows:

WHEREAS, in the ***AT&T Unfiled Agreements Cases, AT&T has alleged against QC***, in summary and incorporating all pleadings filed in each of those cases by reference, that QC provided local, intrastate, and interstate telecommunications services, interconnection and facilities to other carriers at rates, terms or conditions through agreements that were not filed with the applicable state commissions for review and approval or that were not otherwise made available or provided to AT&T at such rates, terms or conditions pursuant to interconnection agreements between the parties or as otherwise allegedly required by state and federal statutory and common law; claims asserted by AT&T include, by way of example and without limitation, breach of contract, breach of covenant of good faith and fair dealing, violation of antidiscrimination and anti-preference laws, violation of state and federal filing obligations, violation of anti-discriminatory restrictions, violation of laws prohibiting unreasonable rates, violation of antitrust and competition laws, fraud, promissory estoppel, for punitive and treble damages, and other related claims[.] (Emphasis added.)

[...]

WHEREAS, in the CLEC Switched Access Agreements Case, ***QCC has alleged against AT&T***, in summary and incorporating all pleadings filed in this case by reference, (1) that AT&T entered into agreements with various CLECs that granted AT&T certain rates, terms and conditions that are different from certain rates, terms and conditions in the CLECs' intrastate switched access tariffs that were effective in Minnesota and 34 other states, and (2) that AT&T's competitive local exchange carriers ("AT&T CLECs") entered into agreements with Verizon or MCI carrier entities that granted certain rates, terms and conditions that are different from certain rates, terms and conditions in the AT&T CLECs' tariffs. Claims asserted by Qwest against AT&T included violations of tariffs and related state law requirements, misrepresentation, omission, fraud, conspiracy to violate taritf requirements, aiding and abetting violations of tariffing requirements, and declaratory and injunctive relief (collectively, these claims are referred to as the "Qwest CLEC Switched Access Agreements Claims")[.] (Emphasis added.)

Q. WHAT IS THE SETTLEMENT PAYMENT AMOUNT?

A. According to the Settlement Agreement, the end result of weighting all countervailing claims between the parties apparently is that Qwest has agreed to pay AT&T *** xxxxxxxxxxx ***

Q. IS THE SETTLEMENT AGREEMENT BETWEEN AT&T AND QWEST RELEVANT TO THIS PROCEEDING?

A. Yes. First, it demonstrates that the off-tariff agreements at issue in the current proceeding are common place and that both Qwest and AT&T engage in them. Most notably, Qwest's feigned surprise at finding that such agreements exist – and the claim that if they had know, Qwest would have been harmed less[47] – seems to be less than forthright.

Second, Qwest's claim – that its competitive position relative to AT&T has been impaired – becomes even more improbable. I have already discussed that Qwest, like others in most retail telecommunications markets, is a price taker and that its competitive position is likely entirely unaffected by the rate differential involved in access services obtained from the Joint CLECs.[48] Now we learn that Qwest, like AT&T, routinely engages in such off-tariff agreements and that the two companies make "true-ups" to each other, to level the playing field. It is important to note that none of this is discussed in the testimony of professor Weisman nor is it in anyway reflected in the damages calculations of Mr. Canfield.

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47 Weisman Direct at 12.

48 Again, under economic theory, we must assume that Qwest simply meets the market price in order to be competitive with AT&T and others, irrespective of whether AT&T is allowed to pay the Joint CLECs' tariffed switched access rates or something lower.

Further, the Commission should note the magnitude of the settlement agreement – a payment made by Qwest to AT&T ostensibly for infractions and harm done by Qwest to AT&T – and the amount of the rate differential Qwest claims in the current proceeding: *** xxxxxxxxxxx xxxxxxxxxxxxxx xxxxxxxxxxxxx xxxxxxxxxxxx xxxxxxxxxxxx xxxxx xxxxxxxxxxxxxxxxxxxx*** Clearly, if these numbers do have a bearing on relative competitive positions, as professor Weisman claims they do, *it is AT&T that was being competitively impaired relative to Qwest and not the other way around.*

Q. DOES THE SETTLEMENT AGREEMENT ADDRESS QWEST'S ABILITY TO PURSUE ALLEGED DAMAGES OR INJURIES RELATED TO OTHER OFF-TARIFF AGREEMENTS?

A. Yes. For example, Paragraph 7 states as follows:

> Consideration from AT&T to Qwest. None of the consideration from AT&T to Qwest in this Settlement Agreement pertains to or is attributable to any damages or injuries that Qwest may have suffered or will suffer as a result of the agreements, conduct, or omissions of CLECs (other than AT&T's CLECs) and such CLECs' direct or indirect provision of discounts off of tariffed switched access charges to *AT&T* or other interexchange carriers, and there are no third party beneficiaries to this Settlement Agreement. Any monetary consideration exchanged between the Parties pursuant to this Settlement Agreement addresses and relates to conduct or events that pre-date this Settlement Agreement and does not provide compensation for any service or facility provided by either Party that post-dates this Settlement Agreement.

Q. DOES THIS MEAN THAT QWEST HAS NOT BEEN "COMPENSATED" FOR ALLEGED HARM DUE TO THE ACTIONS OF THE JOINT CLECS IN THE CURRENT PROCEEDING?

A. No. First, I have already demonstrated that the Joint CLECs' actions have not harmed Qwest. Be that as it may, given that only the parties involved in the negotiations between AT&T and Qwest know what countervailing considerations went into the settlement payment made by Qwest to AT&T, paragraph 7 illuminates *nothing*. The Agreement is not testimony under oath, and the parties were free to add language of their liking, irrespective of the truth content. For example, Qwest may simply have negotiated for this language to be included – *whether or not AT&T compensated Qwest for off-tariff agreements.*

Q. DOES THE SETTLEMENT AGREEMENT ALSO SHOW THE SELECTIVE AND ARBITRARY NATURE OF QWEST'S COMPLAINT?

A. Yes. It is important to note that the Agreement absolves AT&T's CLEC from any liability in this case despite the fact that apparently it too had such agreements with IXCs. In other words, QCC has an agreement with AT&T's CLEC about access charges that result in different treatment of AT&T's CLEC from the other CLECs concerning past untarriffed access charges in Colorado. Section 3 (B) of The Agreement states that nothing precludes Qwest from commencing proceedings "Against any CLEC, other than AT&T's CLECs, that seek any retroactive or prospective relief or remedy…" and "Qwest releases and will not pursue any such claims against AT&T, both as an IXC and as a CLEC." It also dictates that Qwest will not try to "void or have declared unenforceable any such agreements between AT&T and CLECs." In other words, Qwest agreed not to try to interfere with AT&T's "unlawful, discriminatory" contracts. Apparently, Qwest is

only concerned with some contracts but not others, thus undermining its claims that it has been harmed in its competitive position relative to AT&T – after all, it signed an agreement that seems to condone AT&T's practices.

Q. DO YOU HAVE AN ADDITIONAL OBSERVATION REGARDING THE SETTLEMENT AGREEMENT BETWEEN AT&T AND QWEST?

A. Yes. As I have discussed above, the Joint CLECs are no match against AT&T with its massive purchasing power, and if they offered AT&T lower off-tariff rates it is because they felt they had to, not because they wanted to. It is interesting to note that Qwest was sitting across the table from AT&T in negotiations over off-tariff agreements and had an opportunity to address its grievances with AT&T, *the very party who instigated the off-tariff agreements at issue in this proceeding*. While it is not clear whether or not Qwest did (as I discussed above), but if Qwest claims that it didn't, they too must have buckled under against AT&T's negotiating dominance. In any event, Qwest had a chance to settle its grievances with AT&T, and I do not think that the Commission should facilitate Qwest's attempts to turn on the weakest players in all of this: the Joint CLECs.

VI. CRITIQUE OF CANFIELD DAMAGES CALCULATIONS

Q. YOU HAVE ALREADY DISCUSSED A NUMBER OF REASONS WHY QWEST'S CLAIMS ARE MISGUIDED. HOWEVER, EVEN IF THE COMMISSION WERE TO AGREE WITH QWEST THAT IT HAS BEEN HARMED AND THAT DAMAGES SHOULD BE CALCULATED BASED ON

MR. CANFIELD'S APPROACH, ARE MR. CANFIELD'S CALCULATIONS CORRECT AND RELIABLE?

A. No. Even if the Commission were to agree with all of Qwest's arguments, Mr. Canfield's calculations are too deeply flawed to be relied on by the Commission. In what follows, I will discuss the errors in Mr. Canfield's analysis in more detail. My discussion, however, is not intended as an audit of Mr. Canfield's calculations. That is, the corrections I discuss are not intended to capture all of Mr. Canfield's errors. Rather, my discussion serves to demonstrate that Mr. Canfield's numbers are flawed and cannot be relied upon by the Commission.

Q. MR. CANFIELD'S DIRECT TESTIMONY PRESENTS HIS ESTIMATES OF ALLEGED CLECS' "OVERCHARGES," WHICH HE SUMMARIZES ON PAGE 47. IGNORING FOR A MOMENT THE FACT THAT QWEST'S CLAIMS ARE UNJUSTIFIED IN PRINCIPLE, DO YOU AGREE WITH HOW MR. CANFIELD CALCULATES HIS NUMBERS?

A. No. Mr. Canfield's approach is to calculate the difference between the actual intrastate switched access amounts billed to Qwest by CLECs and the amounts Qwest would have been billed under the rates from the CLECs settlement agreements with other IXCs.[49] Though I do not agree with the relevance of this calculation, the review of Mr. Canfield's

[49] Direct Testimony of Derek Canfield on behalf of Qwest Communications Company, LLC "Canfield Direct," p. 47.

analysis[50] shows that his estimates are grossly overstated even from the standpoint of his declared approach.

Q. PLEASE DESCRIBE BRIEFLY MR. CANFIELD'S APPROACH TO ESTIMATING THE ALLEGED "OVERCHARGES."

A. Mr. Canfield's general approach to the calculation of the alleged "overcharges" is (a) to take the difference between CLEC rates on bills to Qwest and the CLEC rates under the agreements with other IXCs; and (b) multiply that difference by Qwest's volumes (minutes of use on CLECs access bills to Qwest). To accomplish this task, Mr. Canfield relies on Qwest's internal records related to CLECs' invoices to Qwest for switched access services in Colorado. For rate information, Mr. Canfield also utilizes CLECs and Qwest state access tariffs, as well as the language in the CLECs' settlement agreements with other IXCs.

Q. PLEASE EXPLAIN IN MORE DETAIL WHY MR. CANFIELD'S NUMERICAL ESTIMATES ARE OVERSTATED.

A. Mr. Canfield's analysis contains a number of inaccuracies. The first group of inaccuracies stem from the fact that Qwest's internal records regarding CLECs' invoices are incomplete. Specifically, as explained in Mr. Canfield's testimony, Qwest's internal

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[50] Mr. Canfield's workbooks underlying his analysis and exhibits DAC1 through DAC13 were provided in Qwest's data responses to Joint CLECs 1st Set, Request No. 3 as confidential attachments A through O.

records include either "electronic" or "manual" invoices.[51] While the "electronic invoices" contain both rate and volume information, for the "manual" invoices Mr. Canfield has access to only the total (interstate and intrastate combined) amounts billed. [52] In other words, not only is Mr. Canfield lacking any rates, volumes or rate element detail from the "manual" invoices, he is also lacking the knowledge of the total *intrastate amounts* (the only jurisdiction of interest in this case). To fill in the gaps in the data, Mr. Canfield makes two generic assumptions: That the split between total interstate and total intrastate amounts on manual invoices is the same as on electronic invoices, and that the "variance" (the estimate of alleged "overcharges") on manual invoices is the same as on electronic invoices.

Intuitively, these generalizations are problematic because there likely exists a "qualitative" difference between electronic and manual invoices. For example, for Eschelon,[53] Mr. Canfield utilizes *** **xxxx**** manual invoices. While these invoices cover a period between *** **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**** of the total billed amounts during this time come from *** **xxx** *** invoices that fall in the first *** **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx** ***.[54] Even worse, almost *** **xxxx** *** of the total billed amounts between *** **xxxxxxxxxxxxxxxxxxxxxxx**** are attributable to

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51 See, for example, Canfield Direct, p. 14.

52 Id.

53 Qwest's data responses to Joint CLECs 1st Set, Request No. 3, confidential attachment E.

54 Qwest's data responses to Joint CLECs 1st Set, Request No. 3, confidential attachment E, Tab "Manual Invoices," column G. Compare the sum of values in cells G2:G18 to the total in cell G92.

xxxxxxxxxxxxxxxxxxxxx ***.[55] Mr. Canfield admitted in discovery that he "did not physically review any of Eschelon's manual bills in performing his analysis."[56] Instead, he simply assumed (based on the review of electronic bills) that *** xxxx[57] of the total billed amounts on Eschelon's manual bills are associated with intrastate jurisdiction. A review of Eschelon's own billing data shows that this assumption results in grossly overstated intrastate amounts. Specifically, for the two November 2002 invoices (invoices that constitute *** xxxxxxxxxxxxxx*** of the total billed amounts on manual invoices in Mr. Canfield's analysis), the correct percent of amounts billed under intrastate jurisdiction is only *** xxxxxxxxxxxxxxxxxxxxxxxx ***. Therefore, by grossly overstating the amounts billed by Eschelon to Qwest in his "manual invoice" analysis, Mr. Canfield grossly overstates the amount of alleged "overcharges" by Eschelon.

Q. IS THE PROBLEM WITH MR. CANFIELD'S ANALYSIS OF "MANUAL" INVOICES SPECIFIC TO ESCHELON'S DATA?

A. No. Mr. Canfield manipulates the "manual invoice" information for XO in the similar fashion, [58] approximating the alleged "overcharge" estimates for manual invoices from the generic proportions observed in electronic billing data. For XO this approach is particularly flawed because – as admitted in Mr. Canfield's testimony, *** **"xxxxxxx**

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55 Id. Compare the sum of values in cells G2:G3 to the total in cell G92.

56 Qwest's response to Eschelon Discovery, 3rd Set, No. 7.

57 Qwest's data responses to Joint CLECs 1st Set, Request No. 3, confidential attachment E, Tab "Manual Invoices," formula in column I.

58 Qwest's data responses to Joint CLECs 1st Set, Request No. 3, confidential attachment C.

xxxxxxxxx" *** [59] in his analysis are coming from manual invoices. I noticed two separate significant flaws in Mr. Canfield's analysis of manual invoices. First, just like in the case of Eschelon's "manual invoice" data, Mr. Canfield approximate method of estimating intrastate amounts[60] leads to a significant overstatement of intrastate amounts and the alleged overcharges. Second, Mr. Canfield's analysis of XO's manual invoice data contains a large number of duplicate entries – records with the same date, invoice number, billing account number ("BAN") and amounts.[61] Duplicate records amount to *** **xxxx**** of alleged XO's "overcharges" on manual bills.

Q. ARE THERE ANY OTHER INACCURACIES IN MR. CANFIELD'S CALCULATIONS OF ALLEGED CLECS' "OVERCHARGES?"

A. Yes. A number of inaccuracies in Mr. Canfield's analysis relate to his interpretation of the "agreement rates" – rates that CLECs received as a result of settlement agreements with other IXCs. The most obvious example is Mr. Canfield's calculation of XO's alleged "overcharges:"[62] Notes in Mr. Canfield's workbook describe the XO's agreement with the other IXCs as charging *** **xxxxxxxxxx** *** for the 800 database service, and

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[59] Canfield Direct, p. 14.

[60] As noted above, Mr. Canfield calculates intrastate amounts for manual invoices by multiplying the total (interstate and intrastate) amounts on the manual bills by the percentage of intrastate amounts on electronic bills.

[61] Qwest's data responses to Joint CLECs 1st Set, Request No. 3, confidential attachment C, Tab "Manual Invoices." Duplicate records are located in rows 27 through 58.

[62] Qwest's data responses to Joint CLECs 1st Set, Request No. 3, confidential attachment C.

*** **xxxxxxxxxxxxxxxxxxxxxxxxxxxx** *** for other switched access services.[63] Yet, Mr. Canfield fails to implement his own notes when performing the calculations: In place of the "agreement rates" he simply uses the ILEC's (Qwest) rates, which are different (and in some cases, higher) than the agreement rates. For example, *** **xxxxx** *** 800 database rate is lower than the ILEC's (Qwest) switched access rate, and starting in July 2006, *** **xxxxxxxxxxxxxxxx** *** became lower than ILEC's (Qwest) switched access rates, meaning that starting in July 2006 *** **xxxxxxxxxxxx xxxxxxxxxxxxxxx xxxxxxxxxxxxxx xxxxxxxxxx** ***. These oversights further overstate Qwest's estimate of alleged overcharges.

Q. ARE ERRORS IN MR. CANFIELD'S DERIVATION OF SETTLEMENT AGREEMENT RATES SPECIFIC TO XO'S DATA?

A. No, there are numerous inaccuracies in Mr. Canfield's calculations for other CLECs. At least four different types of inaccuracies relate to Mr. Canfield's calculations for Eschelon. First, Mr. Canfield inexplicably assumes that under the settlement agreements a portion of IXC's traffic would be billed on a monthly/per facility (rather than usage/ per minute) basis.[64] This assumption is simply incorrect – Eschelon bills (and has been billing) switched access charges only on usage/per minute basis. Mr. Canfield's assumption causes an over-statement of alleged overcharges.

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[63] Id., Tab "Billing," cells B23:B25. This interpretation is consistent with Mr. Brotherson's Confidential Exhibit LBB-4 (pp. 8-9), which contained the Settlement Agreement between XO and AT&T.

[64] Qwest's data responses to Joint CLECs 1st Set, Request No. 3, confidential attachment E, Tab "Billing."

Second, Mr. Canfield failed to include tandem switching charge when calculating Eschelon's settlement agreement rates: Eschelon's settlement agreement rates were generally tied to *** **xxxxxxxxxx** *** rates and set in the form of composite rates derived from various rate elements. When calculating Eschelon's composite settlement agreement rates, Mr. Canfield omitted the tandem switching rate of the amount of $0.005/ per minute during the period of interest.[65] As a result, Mr. Canfield estimates of Eschelon's composite settlement agreement rates are significantly understated,[66] and the resulting alleged overcharges are overstated.

Third, Mr. Canfield incorrectly assumes that the rate setting rules in Eschelon/AT&T agreement would apply to periods *after* the termination of that agreement: As explained in Ms. Copley's testimony, Eschelon's agreement with AT&T (the agreement that set rates at *** **xxxxxxxxxxx** ***) ended in March 6, 2005, and starting from that date and until the billing date of December 5, 2007, AT&T and Eschelon reached a number of billing dispute settlements. Mr. Canfield assumes that rates in these settlements would be calculated at the levels of the then-current *** **xxxxxxxxxxxxxxxxxx** ***, while in reality the settlement rates did not follow this rule. For example, as shown in Ms. Copley's confidential exhibit EC3, for a number of periods AT&T and Eschelon settled

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[65] See Qwest's tariff included in public exhibit LBB-5 (p. 5) to Mr. Brotherson's testimony.

[66] For example, Mr. Canfield calculates Eschelon's settlement agreement rate for originating traffic in the range of *** **xxxxxx** *** per minute depending on the period, while the correct Eschelon's settlement agreement rate for originating traffic was approximately *** **xxxxxx** *** per minute. The latter amount is listed in Confidential exhibit LBB-15, which contains correspondence between AT&T and Eschelon regarding settlements and settlement rates (see for example, p. 25).

on the numerical values of *** **xxxxxxxxxxxxxxxxx** ***, which were higher than the then-current *** **xxxxxxxxxxxxxxx** ***. As a result, Mr. Canfield's assumption causes further overstatement of alleged overcharges.

Fourth, Ms. Copley explains that has been no settlements between Eschelon and AT&T for bills after December 5, 2007 (meaning that Eschelon charged both Qwest and AT&T the same tariffed rates). Yet, Mr. Canfield incorrectly includes the period after December 5, 2007 bills in his calculations of the alleged overcharges, causing their additional overstatement.

Q. ARE THERE ANY OTHER EXAMPLES OF INACCURACIES IN MR. CANFIELD'S CALCULATIONS OF ALLEGED OVERCHARGES?

A. Yes. Several examples are contained in Mr. Canfield's calculations for Granite.[67] First, as a general matter, this workbook appears to be unfinished. For example, in contains blank entries in the area where the main calculations should be done,[68] unmarked and unexplained data entries "on the side"[69] and the rates that Granite supposedly charged Qwest that include zero entries or other values that do not match the tariff.[70]

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67 Qwest's data responses to Joint CLECs 1st Set, Request No. 3, confidential attachment D.

68 Id., Tab "Billing," cells J2 and K2.

69 Id., Tab "Billing," cells P9:S20.

70 Id., Tab "Billing," cells G2 (zero rate), G3 and G4 (originating rates that do not match the tariff rates). The tariff rates are listed in exhibit LBB-15, p.1 to Mr. Brotherson's testimony.

Second, as captured in Mr. Brotherson's confidential exhibits LBB-11 and LBB-12, Granite has a written agreement with AT&T and an informal agreement with Sprint. The AT&T agreement called for *** **xxxxxxxxx** ***, while Sprint's agreement was to charge a rate of *** **xxxxxxxxxxxxxxx** ***.[71] For the state of Colorado the rates in AT&T agreement would be significantly higher than the rates in Sprint's agreement.[72]

Mr. Canfield uses the rates from Sprint's informal agreement in his calculations, rather than the higher rates from the AT&T agreement. This is clearly an aggressive assumption given the informal nature of Sprint's agreement. Further, Mr. Canfield incorrectly claims that the impact of AT&T agreement is "almost identical"[73] to the impact of the Sprint agreement. Given that some of the rates under the AT&T agreement are as high as *** **xxxxxxx** *** the rates of Sprint's agreement,[74] the alleged impact would be significantly different (smaller) under the AT&T rates than under Sprint's rates.[75]

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71 Mr. Brotherson's confidential exhibit LBB-11, pp. 6-7.

72 Specifically, as shown in Ankum's Confidential Exhibit 2 (restatement of Mr. Canfield's calculations for Eschelon), Tab "Billing," cells C56:F57, AT&T rates would be approximately in the range of *** **xxxxxxxxxx**** for originating and *** **xxxxxxx** *** for terminating minutes depending on the bill date.

73 Canfield Direct, p. 21.

74 See footnote above.

75 The abbreviated format of Mr. Canfield's workbook (Qwest's data responses to Joint CLECs 1st Set, Request No. 3, confidential attachment D) does not permit a formal restatement of his workbook: The workbook contains volumes aggregated over long periods of time, while the restatement would require the volumes data for sub-periods to properly capture changes in AT&T rates over time.

Q. WOULD MR. CANFIELD'S ESTIMATES OF ALLEGED OVERCHARGES CHANGE IF YOU CORRECT THE ABOVE DISCUSSED ERRORS?

A. Yes. Again, I stress that I do not agree with the relevance of Mr. Canfield's analysis and perform these calculations only to show that his estimates are grossly overstated even from the standpoint of his declared approach. Re-stating Mr. Canfield's analysis to correct the above discussed errors changes the alleged overcharges estimates as follows: For Eschelon, the estimate decreased from *** **xxxxxxxxx**** to *** **xxxxxxxx** ***[76]; for XO, the estimate decreased from *** **xxxxxxxx** *** to *** **xxxxxxx** ***.[77]

Q. EVEN IF THE COMMISSION WERE TO FIND THAT THE OFF-TARIFF AGREEMENTS WERE DISCRIMINATORY, WOULD THE PROPER REMEDY BE TO HAVE THE JOINT CLECS PAY QWEST?

A. No. Even if the Commission were to somehow find that the Agreements are discriminatory, *then the proper remedy would be to make AT&T and Sprint pay the tariffed rate*.

Under Qwest's proposed solution presumably all other IXCs would be able to get refunds as well. This would create a windfall for all IXCs simply due to AT&T's ability to force small CLECs into off-tariff agreements at the expense of the Joint CLECs, who may be

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[76] Note that a more straightforward and accurate implementation of Mr. Canfield's approach would be to take CLEC's monthly invoices to Qwest and recalculate the total billed amounts by using the rates AT&T paid during the same months.

[77] In any event, XO would not responsible for damages calculated for Allegiance prior to April 2004.

left undercompensated. This is unfair and possibly confiscatory;[78] when the FCC established the price cap regime for LECs, it explicitly recognized that below-cost rates might be confiscatory:

> [A] price cap LEC may petition the Commission to set its rates above the levels permitted by the price cap indices based on a showing that the authorized rate levels will produce earnings that are *so low as to be confiscatory.*[79] (Emphasis added.)

Offering potentially all IXCs discounts off the CLECs tariffs may prevent CLECs from recovering their legitimately incurred costs for offering access services. Again, this is potentially confiscatory (as a matter of economics.) It will also be a permanent drain on CLEC resources which will invariably curtail the CLECs' ability to expand their networks and compete vigorously, to the ultimate detriment of telecom markets and end user customers in Colorado.

VII. CONCLUSION

Q. PLEASE SUMMARIZE YOUR TESTIMONY.

A. In this testimony I have demonstrated that any Joint CLECs agreements with carriers, such as AT&T and Sprint, are consistent with the spirit of FCC and Commission rules and regulations and, thus, Qwest cannot reasonably argue to have been harmed by the

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[78] I am using this term not as a legal concept but as in common parlance.

[79] *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers*, CC Docket Nos. 96-262 and 94-1, Sixth Report and Order, *Low-Volume Long Distance Users*, CC Docket No. 99-249, Report and Order, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Eleventh Report and Order, 15 FCC Rcd 12962 (2000) (hereafter "*CALLS Order*"), ¶ 17.

existence of such agreements. Further, I have demonstrated that Qwest has made no meaningful quantitative demonstration of the extent to which it is been harmed and that Mr. Canfield's calculations are no measure of Qwest's alleged loss of competitiveness. Last, I have demonstrated that Mr. Canfield's calculations contain serious errors and should not be relied on for any purpose.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes, it does.